STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF WEST BLOOMFIELD, Plaintiff-Appellant, v LINAS MASTIS and RAMINTA MASTIS, Defendants-Appellees.	UNPUBLISHED September 19, 2006 No. 268939 Oakland Circuit Court LC No. 2003-046870-CE

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an opinion and order granting summary disposition to defendants. We reverse and remand.

This case is a land use dispute concerning plaintiff's woodland ordinances. Defendants' property is a five-acre parcel containing a house and known as unit six of Maple Place Villas condominium. The property contains approximately two acres of regulated woodlands. It is undisputed that defendants removed or authorized removal of trees from some of the premises.

Plaintiff passed its first woodland ordinance in 1985. Plaintiff's Woodland Board approved the condominium project in 1987, partially conditioned on restricting the number of trees that the developer could remove. Specifically, that only 614 trees with diameters of twelve inches or larger be cut. The condominium was developed in the late 1980s, during which time the developer apparently exceeded the tree-cutting limitation and was fined accordingly.

Plaintiff amended its woodland ordinance in 1988 and 1989. In 1995, plaintiff again amended its woodland ordinance to remedy the constitutional defects identified in *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43; 530 NW2d 99 (1995).[1] In 1997,

[1] In *Karchon*, we held that the woodlands ordinance, as amended in 1988 and 1989, was unconstitutional in part. This Court held that (1) the definitions of "woodland" and other terms were unconstitutionally vague; and (2) the absence of standards for enforcement gave unrestricted discretion to the administrators of the ordinance when determining whether to grant or deny a permit to cut trees. *Id.*, 49, 54.

defendants purchased unit six. Defendants admitted below that their purchase of the property was subject to existing zoning ordinances. Sometime between the fall of 1999 and April 2000, defendants cut trees on unit six. After plaintiff discovered this, it brought this action for enforcement of its woodland protection ordinance. The trial court granted summary disposition to defendants under MCR 2.116(C)(8) and (C)(10), finding defendants' property exempt from the woodland ordinance. Plaintiff appeals.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. Because the trial court considered evidence beyond just the pleadings, MCR 2.116(C)(8) is not applicable. *Id*., 119-120; *Krass v Tri-County Security*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

"The rules of statutory construction apply to ordinances." *Kircher v Ypsilanti*, 269 Mich App 224, 228; 712 NW2d 738 (2005). "The primary rules of construction are that the courts must give effect to the intent of the Legislature and that unambiguous language must be enforced as it is written." *Id*. "Every word, clause, and sentence in a statute [or ordinance] is presumed to be intentional, so we should take care to avoid a construction that renders any part . . . surplusage or nugatory." *Id*., 228, citing *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal quotation marks omitted). This Court gives the words of the statute or ordinance their plain and ordinary meaning, looking outside the statute to ascertain Legislative intent only if the statutory language is ambiguous. *Pohutski, supra* at 683.

It appears that the trial court's grant of summary disposition was based on the unconstitutionality of the 1989 woodland ordinance and a finding that the 1995 woodland ordinance was inapplicable. We note that neither party challenges the constitutionality of the 1995 version of the woodland ordinance on appeal. The question of whether the current woodland ordinance is unconstitutional is not before us, so we presume that it is constitutional. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). However, the trial court indicated that the "relevant provisions contained in the 1995 ordinance, i.e., subsection (h), are almost identical to the original ordinance." To the extent this implies a finding of unconstitutionality of the pertinent sections of the woodland ordinance on the basis of *Karchon*, the trial court erred. This Court in *Karchon* found the 1989 ordinance unconstitutional because it lacked a clear definition of what constituted woodland area and because it lacked precise standards governing permits and exceptions. *Karchon, supra* at 49-57. The former problem affects §26-2, the general definitions section of plaintiff's zoning chapter. The latter problem affects §26-47(d)(1)(c)(3),[2] which partially governs standards for issuance of woodland permits for harvesting. Neither applies here: it is undisputed that defendants removed trees from

[2] At the time *Karchon* was decided, this was §26-46.

woodland area and that they did not seek a permit to do so. In *Karchon*, we did not address any portion of the ordinance relevant to the present case.

Furthermore, the 1995 ordinance was in effect, and therefore by defendants' own admissions applicable, when defendants cut the trees between the fall of 1999 and April 2000. The 1995 version of the ordinance, as codified, provides that "[t]here shall be no cutting of trees or harvesting of forest products lying either wholly or partially within a woodland without there first having been a woodland permit applied for . . . and the permit having been issued by the township." § 26-47(d)(1)(a). Defendant's property contains woodlands designated as such on the woodlands map. There is no ambiguity in the prohibition that "[t]here shall be no cutting of trees or harvesting of forest products lying either wholly or partially within a woodland without there first having been a woodland permit applied for . . . and the permit having been issued by the township." § 26-47(d)(1)(a). Thus, under the 1995 version of the ordinance, defendants were required to obtain a permit before cutting trees from unit six's woodland.

Furthermore, § 47-26(h) provides as follows:

> (h) *Tree Cutting on One-Family Residential Lots with[in] Subdivisions Platted before the Adoption of Woodland Ordinance*:
>
> (1) *Acts for which a permit is not required.* The following tree cutting activities shall not be permitted without [a] permit on those lots or outlots within single-family subdivisions that received final plat or final preliminary plat approval prior to the adoption of the woodland provisions of the zoning ordinance and any subsequent amendments thereto:
>
> a. Any tree within ten (10) feet of the approved location of a building or structure including underground utilities.
>
> b. Any tree with a dbh less than three (3) inches.
>
> (2) *Permit required.* Except as provided in subsection (h)(1) above, *a woodland permit shall be required for the removal of any other tree on an existing one-family residential lot within a woodland.* The application and review process shall be in accordance with paragraph (g). [Last emphasis added.]

The trial court focused on the heading for subsection (h), which states that it applies to "One-Family Residential lots *with[in] Subdivisions Platted* before the Adoption of Woodland Ordinance." Headings are normally not conclusive proof of the purpose of legislation. *Camaj v S S Kresge Co*, 426 Mich 281, 289; 393 NW2d 875 (1986). Nothing in subsection (h)(1) exempts defendants' condominium unit, so the plain language of subsection (h)(2) clearly and unambiguously provides that a woodland permit "shall be required for the removal of any other tree on an existing one-family residential lot within a woodland." "Shall" is mandatory. *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

Defendants contend that unit six is not "an existing one-family residential lot" as defined by plaintiff's ordinances. We disagree. The ordinances define "lot" broadly:

> *A parcel of land* occupied . . . by a main building or a group of such buildings and accessory building[s], or utilized for the principal use and uses accessory therefor, together with such open spaces as are required under the provisions of this chapter. A lot may or may not be specifically designated as such on public records. The word 'lot' includes 'plot' and 'parcel.'" [WBCTC § 26-2 (emphasis added).]

This language is broad enough to encompass unit six. Unit six is a parcel or a lot within the condominium. Therefore, defendants were required to obtain a permit before removing the trees.

The trial court found that §26-47(k) exempts defendants from the 1989 amended zoning ordinance. Subsection (k) provides as follows:

> *Woodland Permits Approved Prior to October 27, 1989*: Site plans or plats approved by the woodland board, planning commission or township board prior to October 27, 1989, shall be exempt from the terms and provisions of the amendments of this section, which became effective on October 27, 1989. *Those site plans approved prior to October 27, 1989, shall comply with the terms and conditions of the woodland permit.* [WBCTC § 26-47(k) (second emphasis added).]

Even if subsection (k) exempted defendants from the 1989 ordinance, they would remain subject to the 1995 ordinance. Furthermore, subsection (k) unambiguously exempts only "site plans or plats," not individual lots or condominium units. In any event, even if subsection (k) exempted defendants from the permit requirements of the 1995 ordinance, subsection (k) would continue to require any tree cutting by defendants to comply with the original woodland permit granted to the developer. As noted, the original woodland permit allowed a total of 614 trees with diameters of twelve inches or larger to be cut, and the developer exceeded this limitation. At the time defendants cut the trees, no more trees were permitted to be cut.

The grant of summary disposition to defendants is reversed[3] and this matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette

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[3] We do not here order the trial court to grant summary disposition to plaintiff under MCR 2.116(C)(9), because that issue requires consideration of whether defendants stated a valid defense to the claims, which is an issue that was not argued by the parties nor at issue on appeal. However, the trial court may reconsider on remand whether summary disposition should be granted to plaintiff in light of the resolution given here of the issues of interpretation of the ordinance.